IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0161

BNSF RAILWAY COMPANY,
Appellant/Petitioner

v.

CHAD CRINGLE and MONTANA DEPARTMENT OF LABOR, HUMAN RIGHTS COMMISSION
Appellee/Respondents

Re: District Court Case No.: BDV-2009-1016

BRIEF IN OPPOSITION TO BNSF'S MOTION FOR RELIEF FROM DISTRICT COURT'S ORDER DENYING STAY

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FACTUAL AND PROCEDURAL BACKGROUND

Chad Cringle filed his complaint with the Montana Human Rights Bureau on July 17, 2008, alleging that he had been discriminated against based on his height and weight without regard to his individual qualifications for the job of conductor trainee with BNSF Railway Company. On January 7, 2009, after a thorough investigation, the Bureau found probable cause that discrimination had occurred. (Affidavit ¶1, Exh. No. 4)

The case proceeded to a contested case hearing before the Department of Labor which, having already decided the identical issues on two previous occasions against the same offending employer, granted Summary Disposition on the issue of liability on May 5, 2009, and on September 2, 2009, issued its final decision. No notice of appeal was filed until 20 days later on September 22, 2009. (¶¶2 and 3)

The facts in this case, the issues, the offending employer, and the applicable law are identical to those in two previous cases affirmed by this court[1].

As in the previous two cases, no evidence was offered by BNSF at the hearing. (¶5) In the *Bilbruck* case, however, BNSF was able to avoid payment of the damages awarded for six years until this court entered its final decision. When it finally had an opportunity to address the merits of its appeal before this court, it

[1]See *Bilbruck v. BNSF Ry. Co.*, 2009 MT 216 N, 2009 Mont. LEXIS 256 (Cause No. DA-08-0424), and *Montana Department of Labor & Industry v. BNSF Railway Co.*, 2009 MT 262N, 2009 Mont. LEXIS 394 (consolidated Cause Nos. DA-08-0517, DA-08-0558, DA-08-0559) (Matt O'Dea case). (¶4)

raised no substantive issues. The same scenario occurred in O'Dea where BNSF was able to avoid ultimate resolution for five years, but when finally given an opportunity to raise substantive issues on appeal to this court, declined to do so. (¶6)

Both previous cases were appealed to and affirmed by the Human Rights Commission. Both cases were appealed to and affirmed by the First Judicial District Court, Judge Jeffrey Sherlock presiding. (¶¶7 and 8)

The only distinguishing fact in this case is that BNSF's appeal of the hearing examiner's decision was untimely.

The District Court was also aware that because of BNSF's unlawful act of discrimination, Mr. Cringle was denied a job which would have paid him $50,000 a year and provided for retirement and health benefits. Instead, he is unemployed, has been unable to make house payments, has had his only motor vehicle repossessed, has sold personal possessions and pawned the tools of his trade to support himself, and is, in general, depending on friends and family for financial assistance. He is in danger of losing his home soon if he doesn't find money with which to pay his taxes. (Cringle Dist. Ct. Aff., Exh. No. 1)

Because it presided over the previous two appeals, the district court was familiar with the factual background, the legal issues, the likelihood of success on appeal, and the unreasonable delay that was caused by the railroad's procedural manipulation of the justice system in the previous two cases.

STANDARD OF REVIEW

There is no prior case law addressing the standard of review of a district court's denial of a motion to stay judgment and approve a supersedeas bond pending appeal. However, Rule 22 M.R.App.P. requires that the stay first be sought from the district court, presumably based on the district court's greater familiarity with the case and the equities involved. Pursuant to Rule 22(2)(a)(i), the district court's denial can only be reversed for "good cause" supported by affidavit. The fact that the relief must be sought in the first instance from the district court with its greater familiarity suggests that some deference should be given to the district court's decision and that it should only be set aside for an abuse of discretion. The United States Supreme Court has held that "a district court's conclusion that a stay is unwarranted is entitled to considerable deference." *Res v. Barnes*, 405 U.S. 1201, 1203-1204.

Although there are no Montana decisions explaining what will establish "good cause," there are four factors considered pursuant to the federal counterpart, Rule 8(a) Fed.R.App.P. They are: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injury the other parties interested in the proceedings; and, 4) where the public interest lies. *Stormans, Inc., v. Selecky*, 526 F.3d 406, 408 (9th Cir. 2008); *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed. 2d 724 (1987).

BNSF can't satisfy any of the four factors. In addition, its proposed bond did not meet the requirements of Rule 22(1) M.R.App.P.[2] Therefore, its motion should be denied.

AUTHORITIES

Section 49-2-505(4) MCA provides that a party may appeal a decision of the hearing officer by filing an appeal with the Montana Human Rights Commission within fourteen days from issuance of the decision. Section 49-2-505(3)(c) MCA provides in relevant part as follows:

> "...If the decision is not appealed to the Commission within fourteen days as provided in subsection (4), the decision becomes final and is not appealable to the district court."

The railroad had until September 16, 2009, within which to appeal the hearing officer's decision. Rule 6(e) M.R.Civ.P., which allows an additional three days when a party is required to do something within a period of time after service of a document, is not applicable based on the language of §42-2-505(4) but the result would be no different.

BNSF's notice of appeal was not even dated until September 22, 2009, six days after it was due. When asked 3 days later, the HRC was advised that Cringle objected to the late notice. That response was confirmed by letter dated September 28, 2009, a copy of which is attached as Exhibit No. 2. Therefore, on October 5, 2009, the HRC concluded the appeal was untimely and dismissed it. (Exh. No. 3)

[2] Bond was for $293,150.54. Judgment was for $439,987.21.

For the reasons set forth in the following argument, the deadline for filing an appeal to the Human Rights Commission is jurisdictional or, at a minimum, "categorical" and the railroad's untimely appeal was properly dismissed.

Miller v. Eighteenth Judicial Dist. Ct., 2007 MT 149, 337 Mont. 488, 162 P.3d 121 is dispositive and requires dismissal of the railroad's petition. Justice Nelson's concurring opinion in *State v. Clark*, 2008 MT 317 ¶¶19-32, 346 Mont. 80, 193 P.2d 934 elaborates on the rule articulated in *Miller*.

In *Miller*, a prosecutor did not comply with Standard I.1.A of the Supreme Court's Standards For Competency Of Counsel For Indigent Persons In Death Penalty Cases which requires notice to the defendant within sixty days after arraignment of the state's intent to seek the death penalty. The district court excused the failure to comply because no prejudice to the defendant had been shown. The court agreed with the defendant that because there was no language in the standard which required that prejudice be shown or allowed for a good cause exception to an untimely notice, rules of statutory construction did not permit the district court to add those provisions. It stated in language which would be dispositive in this case, (even accepting the railroad's premise that the fourteen day time limit which applies in this case is not jurisdictional), that:

> "By the expressed terms of this rule, the prosecutor 'shall' – as opposed to 'may' or 'should' – file notice stating whether he or she intends to seek the death penalty upon a conviction within sixty days after the defendant's arraignment. In other words, the notice and timing requirements are mandatory, not discretionary or

> permissive. (citations omitted.) Most importantly, nothing in the plain language of the rule suggests that lack of prejudice to the defendant or the defendant's knowledge that the case is a potential death penalty case can supplant the express requirement that the notice be filed within the sixty-day timeframe." *Miller*, ¶39.

It was the district court's duty to construe standard I.1.A "as it is written..., 'not to insert what has been omitted,' §1-2-101, MCA." *Miller*, ¶40.

Likewise, in this case, §49-2-505(3)(c) MCA is mandatory, not permissive. It simply states: "If the decision is not appealed to the Commission within fourteen days as provided in subsection (4), the decision becomes final and is not appealable to the district court."

This court's opinion distinguished between "categorical time prescriptions" which are "inflexible" or "rigid" – but non-jurisdictional, *Miller*, ¶44, and jurisdictional time periods which relate directly to a court's authority to hear a case and can never be waived or forfeited by the consent of the party. It held that Standard I.1.A. is necessarily a categorical time prescription because only Article VII, Section 4 can establish jurisdiction and the court, cannot by rule, limit its own jurisdiction or the jurisdiction of district courts. *Miller*, ¶¶45–46. However, it held that even a categorical time prescription assures relief to a party who properly raises it. *Miller*, ¶46.

§49-2-505(3)(c) MCA is jurisdictional, not merely a categorical time prescription. As observed by the Supreme Court, jurisdiction for the state's district courts is established by Article VII, Section 4 of the Montana Constitution. The

only reference to jurisdiction over appeals from administrative agencies is found in subparagraph (2) which provides that "The legislature may provide for direct review by the district court of decisions of administrative agencies." The necessary corollary to that grant of jurisdiction is that the legislature may circumscribe or limit jurisdiction over appeal from administrative agencies. It has done so by statute in § 49-2-505(3)(c)(4) MCA. It has stated that district court jurisdiction over appeals from Department of Labor decisions regarding human rights does not exist absent a timely appeal to the full Human Rights Commission.

As the Supreme Court made clear in *Miller*, "Subject-matter jurisdiction, because it involves the court's power to hear the case, can never be forfeited or waived, nor can it be conferred by the consent of a party,..." *Miller*, ¶44.

Only the legislature can create jurisdiction in the district court to hear an appeal from an agency decision. In doing so, it has specifically defined the limits of that jurisdiction. The railroad's appeal does not meet those standards and therefore, there was no jurisdiction in the district court to entertain any appeal by BNSF from the Hearing Examiner's decision dated September 2, 2009, or the HRC decision which correctly rejected its appeal.

RESPONSE TO BNSF'S ARGUMENTS

On p. 6 of its brief, BNSF argues that Cringle's monetary interests would be fully protected with a supersedeas bond. Spoken like a company with unlimited resources. Chad Cringle's monetary interests are in purchasing transportation so

that he can continue his search for employment and in keeping a roof over his head. Both of those interests are at risk because of BNSF's repeated pattern of delay for the sake of delay.

On p. 7 of its brief, BNSF complains that without a stay it would have to "undo" the injunctive relief awarded to the Department and would have difficulty recovering the money paid to Cringle if it was successful. First, the injunctive relief awarded to the department is no different than that which was awarded and reduced to final judgment and affirmed in two previous cases. Therefore, it already cannot be undone. Second, BNSF's complaints about difficulty recovering its money ring hollow considering the ordeal to which it put similarly situated parties before paying them the money it owed them.

On p. 7, BNSF attempts to make some distinction between the district court's authority to review the hearing officer's decision and the HRC's decision. There is no distinction. By the plain language of the statute, the hearing officer's decision is final and neither the HRC nor the district court had authority to review anything.

On p. 8 of its brief, BNSF contends that all it sought was an order from the district court compelling HRC to review that which by statute was a final decision. The district court had no authority to ignore the plain language of the statute and order HRC to do anything. Therefore, its decision was correct and should be

affirmed regardless of its reasoning[3].

On p. 8, BNSF contends that it would be "extraordinary" to have no review of an agency's dismissal of its appeal. However, a review of the agency's dismissal is exactly what it received. After review, the district court simply applied the controlling statute the way it was written. There is no language in the statute which allowed second guessing whether the HRC properly exercised discretion it didn't have.

On p. 8, BNSF also contends, citing irrelevant and inapplicable statutes, that the district court had jurisdiction to review the HRC dismissal order. All of its citations are misapplied[4].

On p. 8, BNSF relies on statutes pertaining to writs of mandate, writs of review, or other appropriate writs as authority for the district court to consider HRC's dismissal. None of those authorities allow the district court to reverse HRC's correct application of the law. That's why it refused to do so.

Nor are the authorities cited on p. 9 applicable[5].

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[3] "It is an axiom of Montana law that we will affirm a district court if it reaches the right result, even though its reasoning may not be entirely correct." *PPL Mont., LLC v. State,* 2010 MT 64, ¶112, 355 Mont. 402, __P.3d__ (citing *Good Schs. Missoula, Inc., v. Missoula Co. Pub. Sch. Dist. No. 1,* 2008 MT 231, ¶24, 344 Mont. 374, 188 P.3d 1013).

[4] Section 2-4-702 MCA simply permits a party who has exhausted all administrative remedies to petition a district court for judicial review of a final agency decision. BNSF did not do so. Therefore, the DOL's decision was not reviewable. See *Shoemaker v. Denke*, 319 Mont. 238, 84 P.3d 4 (2002). Section 2-4-701 provides that a "preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Here, there was a remedy. BNSF simply failed to timely pursue it.

[5] *Davis v. State*, 2008 MT 226, 344 Mont. 300, 187 P.2d. 654, relates to criminal not civil procedure; it does not alter the previously stated principles; and is based on estoppel where an

Finally, on p. 10 of its brief, BNSF cites Rule 24.9.113(3) ARM for its argument that the HRC actually had authority to extend the statutory time limit for appeals. However, that rule is inapplicable by its plain language. It applies only to deadlines which are not fixed by statute. This deadline was fixed by §49-2-505(4) MCA, the plain language of which makes no provision for good cause or equitable exceptions. Furthermore, even if an agency wanted to provide an exception to a categorical statutory time limit, it couldn't do so. Administrative rules which are inconsistent with a statute are invalid.

CONCLUSION

Based on all four factors to be considered for purposes of deciding "good cause", BNSF's motion for a stay and approval of its supersedeas bond should be denied.

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unrepresented inmate actually tried to comply with a deadline but was unable to do so. There are no grounds alleged in this case for equitable tolling. Mistakes or omissions on the part of the party who misses a time deadline do not justify equitable tolling.

Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. Of Adjustment, Central Region, 130 S.Ct. 584, 596-99 (2009) is also inapplicable and unpersuasive. In *Union Pacific*, the National Railroad Adjustment Board (NRAB) dismissed arbitration proceedings between the union and Union Pacific, concluding it lacked jurisdiction because the record did not contain proof that the parties held a conference to attempt to resolve their dispute, *Union Pacific,* 2009 WL at 10-11. In reality, the parties had conferenced on at least two, if not all five of the disputes. *Id* Where conferencing is disputed, the proceedings can be adjourned to cure the lapse. *Id* at 14. The rules at issue did not preclude such a solution. *Id*

Ives v. TransWorld Airlines, Inc., 455 U.S. 385, 393 (1982), involved reconciliation of the statutory time limit for filing a complaint with the EEOC and the authorizing legislation for the EEOC to determine whether the time limit was jurisdictional. It involved none of the law or issues in this case and has no applicability.

DATED the 11th day of June, 2010.

By: _____
Terry N. Trieweiler

CERTIFICATE OF SERVICE

This is to certify that on the 11th day of June, 2010, a true and exact copy of the foregoing document was sent by U.S. mail, first class, postage pre-paid, addressed to:

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